No. 49.

Brief of Totten

Office Supreme Court, U. S.
FILED
OCT 8 1898
JAMES H. McKENNEY,
CLERK.

Enoch Totten for Peter Heirs.

Filed Oct. 8, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 49.

MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

Brief for Appellants, William L. Dunlop and the Heirs of George Peter, Deceased.

ENOCH TOTTEN,
J. HOLDSWORTH GORDON,
ARTHUR PETER,
Solicitors for Peter Heirs.

LAW REPORTER PRINT.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 49.

MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

Brief for Appellants, William L. Dunlop and the Heirs of George Peter, Deceased.

STATEMENT OF CASE.

In the original bill George Peter and William L. Dunlop were made parties defendant. George Peter having died, the cause was revived in the name of his widow and heirs-at-law. R., Vol. 7, p. 2404. In the answer of George Peter and William L. Dunlop (R., Vol. 1, pp. 88–92) they claim for themselves and the other heirs and devisees of Robert Peter. Who these heirs and devisees are is shown in the testimony of Britannia W. Kennon. R., Vol. 3, p. 901 *et seq.*

This answer states that Robert Peter was seized of a tract of land called "Mexico," and on June 29, 1791, conveyed the same to Thomas Beall and John M. Gantt, trustees, upon special trusts for a Federal city. That said tract "Mexico" embraced all the land fronting on the north of

the Potomac River from the mouth of Rock Creek down to a point at the end of a line running north and south through the center of the public reservation on which the National Naval Observatory then stood, or from the west line of Twenty-sixth street extended to the River to a point which the west line of Twenty-fourth street extended would strike the River. That a considerable portion of ground lying south of the terminus of Twenty-fifth and Twenty-sixth streets and of the street south of square Twenty-two and south of a portion of said Observatory grounds had never been laid off into squares and lots, but remained in the same condition as when originally granted by Robert Peter, except as changed by natural accretions, prior to the improvement of the flats, and remained undisposed of.

That as early as June 25, 1798, Robert Peter claimed the riparian rights attached to said land, and the Commissioners, while not admitting that square Twenty-two was entitled to water rights, said that—

> "as there is some high ground between the Water street and the water, we have no objection to laying out a new street between Water street and the channel, and divide such square when laid out so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

Said defendants then claimed: All the rights as secured to Robert Peter under the deed of trust from him. Beginning at the southeast corner of Square 12, as designated on complainants' Exhibit B, and running north with the east side of said square to a point opposite the south line of Water street in said exhibit; thence across Twenty-sixth street to the south side of said Water street; thence along the south side of Water street to the east side of Twenty-fifth street; thence on the east side of said street to the southwest corner of the Naval Observatory grounds; thence with the south line of said grounds to a point which would be intersected by the west line of Twenty-fourth street if

ASSIGNMENTS OF ERROR.

I.

The court erred in holding that the claim of these appellants, as set forth in their answer, to a right, title and interest in said land or water, or any portion thereof, was invalid, void and of none effect.

II.

The court erred in decreeing that there did not exist any right, title or interest in these appellants to or in any part of said land or water adverse to the complete and paramount rights of the United States to the said land or water.

III.

The court erred in decreeing that the right and title claimed by the United States to all of the land and water, in the bill of complaint described, was absolute in the United States as against these appellants.

IV.

The court erred in not decreeing that the appellants had a right, title and interest in some of the land and water in the bill of complaint described.

extended through said grounds; then with that line to the channel of the river; then with the channel of the river to a point opposite the place of the beginning, and then to the beginning, with the accretions and riparian rights to the channel of the river.

That said land was held exclusively under the trusts created by the original grant, and they deny the existence of any claim which contravened their rights to said land, or the riparian rights appurtenant thereto to the channel of the river, and claim all and every right reserved to Robert Peter and vested in him under and by virtue of the trusts created by the deed of trust from him.

BRIEF.

As to the Claims of the United States.

In June, 1791, Robert Peter conveyed to Thomas Beall and John Mackall Gantt certain lands in trust for a Federal city. At that time he was seized of the tract called Mexico, the only description of which is given in the patent from the State of Maryland dated 28th October, 1796 R., Vol. 5, p. 121.

Whilst it is true that this patent is dated subsequently to the act of cession of 1788, reference to the same will show that it is based on resurveys of older grants, the eldest bearing date on the 10th October, 1664, and the youngest on the 24th September, 1762, and that of the 225 acres 11 perches, contained therein, only 2 acres, 31 perches, was vacant land. Comparison with the description in said patent and the plats (Exhibit G. P. No. 6, Record, Vol. 5, pp. 124 and 125), would indicate that the vacancy was in or near square No. 2, and not opposite or near the house line between "Cedar Point" and "Key of All Keys," and therefore did not affect the land claimed by the Peter heirs,

which consequently would not be affected by the decision in Shoemaker *vs.* United States, 147 U. S., 313–14.

The appellants claim that the United States can not impeach the title of Robert Peter to the land in controversy on account of any failure in the record, as it is admitted by the United States "that at the time of the execution and delivery of said deed Robert Peter, the grantor therein was the owner of the land abutting on the river from the mouth of Rock Creek to Twenty-seventh street west, and from Twenty-seventh street west to the point called 'Key of All Keys' on the shore, as shown on 'Exhibit U. S., No. 45,' and including the land shown on said 'Exhibit U. S, No. 45,' bounded on the south by the river and lying between Twenty-seventh street west and a line projecting north from the said 'Key of All Keys;' and that the title of said Robert Peter to the said land was regularly devised through patents or grants from the State of Maryland." R., Vol. 3, p. 899.

In said deed of June, 1791 (Exhibit U. S., 16 R., Vol. 5, p. 37 *et seq.*), Robert Peter, in consideration of five shillings—

> "and also for and in consideration of the uses and trusts hereinafter mentioned to be performed by the said Thomas Beall and John Mackall Gantt, and the survivor of them, and the heir of such survivor, according to the true intent and meaning thereof,"

conveyed all his lands embraced within the Federal City, and running with the waters of the Potomac River, to said Thomas Beall and John Mackall Gantt, to hold upon the special trusts and no other, namely, that said land, with other land, be laid out for a Federal city—

> "with such streets, squares, parcels and lots, as the President of the United States for the time being shall approve,"

and shall convey to the commissioners appointed by virtue

of the Act of Congress entitled "An Act for establishing the temporary and permanent seat of government of the United States," for the use of the United States—

> "all of said streets and such of said squares, parcels and lots as the President shall deem proper for the use of the United States, and that as to the residue of the lots into which the said lands hereby bargained and sold shall have been laid off and divided, that a fair and equal division shall be made of them; and if no other mode of division shall be agreed on by consent of Robert Peter and the commissioners, for the time being, then such residue of the said lots shall be divided, every other lot alternate to the said Robert Peter; and it shall in that event be determined by lot whether the said Robert Peter shall begin with the lot of the lowest number laid out on the said land, or the following number; *and all the said lots which may in any manner be divided or assigned to the said Robert Peter shall thereupon, together with any part of the said bargained and sold land, if any, which shall not have been laid out in the said city, be conveyed by the said Thomas Beall and John Mackall Gantt, or the survivors of them, or the heirs of such survivor to him, the said Robert Peter, his heirs and assigns.*"

Said deed further provides that—

> "because it may so happen that by the deaths or removals of the said Thomas Beall and John Mackall Gantt, or from other causes, difficulties may occur in fully perfecting the said trust by executing all the said conveyances, if no eventual provision is made—it is is therefore agreed and covenanted between all the said parties, that the said Thomas Beall and John Mackall Gantt, or either of them, or the heirs of either of them may, and that they at any time at the request of the President of the United States, for the time being, will convey all or any of the lands hereby bargained and sold, which shall not then have been conveyed in execution of the trusts aforesaid to such person or persons as he shall appoint,

> in fee simple, subject to the trusts, then remaining to be executed, and to the end the same may be perfected—"

Prior to the founding of the City of Washington and the conveyance of his lands for that purpose to Beall and Gantt, trustees, Robert Peter, proceeding under patent from the State of Maryland, and being the owner, as admitted by the United States—

> "was entitled to enjoy his riparian rights for his private uses and the exclusion of all the world besides."
>
> Potomac Steamboat Company *vs.* Upper Steamboat Company, 109 U. S. 686.

As interpreted by the courts of Maryland he was entitled to the land covered by the river, and consequently to accretions by alluvium, recessions of the water from the shore, or by artificial deposits.

> Browne *vs.* Kennedy, 5 H. & J., 196.
> Giraud *vs.* Hughes, 1 Gill & John., 249.

Being so entitled he conveyed to Beall and Gantt all his interest in said land in trust for the purposes of the Federal city. These trusts were, however, specific, namely, that such streets, squares and lots should be laid out as the President might direct, and conveyances made of all said streets and such of said squares and lots as he should think proper for the use of the United States, and the residue of said lots should be divided between the United States and Robert Peter, and the lots so divided to him "together with any part of said land which shall not have been laid out in the said city" should be conveyed to Robert Peter in fee by said trustees.

If all the property conveyed by Robert Peter has not been laid out into streets, squares and lots, and conveyed either to the United States or to Robert Peter, such part as

has not been laid out and so conveyed, should, under the provisions of the deed of trust to Beall and Gantt be held in trust for Robert Peter, or conveyed to him or those claiming under him.

The plan of the city appears to have been changed from time to time. That submitted by L'Enfant (R. Vol. 6, p. 352) was never adopted. In what is known as Ellicott's map (Exhibit U. S. 47, R., Vol. 5, p. 76, and R., Vol. 7, p. 2276), Squares 12 and 22 are both shown with a continuous space or street on the south betweem them and the river. Reference to this plat will show that neither of said squares, as thereon laid down, are the squares of these numbers now in existence. Square 22 being separated from Square 21 on the north, not by a street, but by a large space of unplotted ground.

In June, 1795, Mr. Dermot was directed to prepare a plat (R., Vol. 4, p. 1599), which plat (Exhibit M. F. M. 13, R. 5, p. 118) was approved by General Washington on March 2, 1797, and by President Adams on July 23, 1798 (R., Vol. 7, pp. 2303 and 2304), and was referred to by Mr. Lee, the Attorney General, in an opinion dated January 7, 1799, as follows:

> "If this plan, under the Presidential signature, varies from L'Enfant or Ellicott's essays, they must yield to it, as they are to be considered only as preparatory to that plan, which received, ultimately, the formal and solemn approbation of the President."
>
> R., Vol. 7, p. 2307.

This plan shows not only Squares 12 and 22 but also a new square south of Square 12. Reference to the plat of Square 22, as it now exists (Exhibit G. P. No. 4, R. 5, p. 121), shows that it is neither the square shown on the Ellicott or Dermot maps; that it occupies the unplotted ground between Squares 21 and 22, as shown on the Ellicott map; and only a small portion of lot 22, as shown on the Dermot map. Failing, as it did, to include all the land conveyed

by the Peter deed, Nicholas King, in behalf of Robert Peter, on June 22, 1798, addressed a letter to the Commissioners, in which, after calling attention to the fact that square south of Square 12 had not been divided between said Peter and the Commissioners, he adds:

> "The square No. 22 as at present laid off and divided with the Commissioners, does not extend to the channel by several hundred feet. If another square be introduced to the south of it, that square will be covered by a small depth of water, and the proprietors thereof will want earth to wharf and fill it up with. It will, perhaps, be best, therefore, to redivide square No. 22 and attach the low ground to it."
>
> R., Vol. 6, p. 205.

In answer to this letter the Commissioners, under date of 25th June, 1798, say:

> "With respect to Square No. 22, we do not conceive that it is entitled to any water privileges, as a street intervenes between it and the water; but as there is some high ground between the Water street and the water, we have no objection to laying out a new square between Water street and the channel, and divide such square when laid out, so as to make it beneficial to Mr. Peter and the public, as circumstances will admit."
>
> R., Vol. 3, p. 900.

Square 22, as it now exists, was divided between Mr. Peter and the United States on 27th July, 1796, prior to the adoption of the Dermot map and the letter of the Commissioners 25th June, 1798, and square south of Square 12 was divided between Mr. Peter and the United States subsequently to the adoption of said map and the date of said letter. (Exhibit G. P., No. 3, R., Vol. 5, p. 121.) Inspection of the Dermot map shows that Square 22 as laid out and divided included but a small part of Square 22 as laid out on that map; and that said square as laid out on said map,

includes not only Square 22 as divided, but also the street south thereof, and also the unnumbered and undivided square lying between said street and the river, as shown on the King plat, hereafter referred to.

The admission of the Commissioners that there was "some high ground between Water street and the water," is supplemented by the testimony of William Forsyth (R., Vol. 3, pp. 926, 927), and the plat referred to in said testimony (Exhibit G. P., No. 7, R., Vol. 5, p. 124) and the testimony in R., Vol. 3, pp. 907–946.

In the King plats (Exhibit G. P. No. 11, R., Vol. 6, p. 128) an unencumbered square is laid out south of Square 22, bounded on the north by upper Water street, and on the south by Water street, sometimes called lower Water street.

As the street lying south of Square No. 22 did not occupy the whole space between said square and the river, it is urged that the land lying south of said street is not affected by the decision in 109 U. S., p. 672.

In that case, on page 687, referring to the argument there, depriving the original proprietors of the right of wharfage opposite their property on the north side of Water street, and in effect, giving to the United States the water front of the river without an equivalent, was in violation of their equality in the division which was expressly stipulated for in the deed to Beall and Gantt, the court said:

> "But there is no dispute as to the division that was actually made, and each party received, so far as the conveyances are concerned, precisely what he agreed to take and was satisfied with. The supposed inequality arises from a construction of law upon the transaction, as it is admitted or proved to have taken place, and its legal effect is not dependent upon its actual results."

As the street south of Square No. 22 did not extend to the water of the river as is shown by the plats, contempora-

neous correspondence, and testimony, the title in said street did not vest riparian rights, but said rights remained to the land lying south of said street, and in the face of the facts presented by the record, it can not be urged that, in the division made, Mr. Peter received "precisely what he agreed to take and was satisfied with." He was not satisfied with the division as made and did not agree to take what was conveyed to him in full satisfaction of his claims under the deed of trust. On the contrary, he made demand on the commissioners, with whom the division between the proprietors and the United States rested, for an equitable division of the land lying south of the street opposite Square No. 22, and said commissioners, recognizing the justice of his claim, expressed their willingness to lay out said land and make such division.

If the plan of the city as set out in the Ellicott map remained unchanged, then a tract of ground not laid out remained between Upper Water street and the channel of the river, which was held in trust for Robert Peter and his heirs, and which carried with it the enjoyment, using the words of this court, of "his riparian rights for his private uses, and to the exclusion of all the world besides;" thus entitling him to the land covered by the river and any accretions by alluvancies, recession of the water from the shore, or artificial deposits; and the fact that he did not improve the property, or failed to use it, did not work to his injury; for—

> "a man can not lose the title to his lands by leaving them in their natural state, without improvement, or forfeit them by non-user."
>
> City of Boston *vs.* Lecraw, 17 Howard, 436.

In view of the fact that the plats show that the street lying south of Square 22 was not a continuous street, such as Water street is described in 109 U. S., page 678; namely, as—

> "designated on the adopted plan of the city as occu-

> pying the whole line of the river front, and separating the line of the squares from the river for the entire distance from Fourteenth street to the Arsenal Grounds."

And the further fact that the commissioners recognized that high ground existed south of said streets, and should, in compliance with the terms of the deed of trust, be laid off and divided into squares, it is contended that the principles laid down by the court in 109 U. S. 672 should not apply to this ground.

If it should be held that subsequent to the adoption of the Ellicott map changes were made, with authority, in the plan of the city, and that Water street, or Lower Water street, was extended so as to run along the entire river front, and that the decision in 109 U. S. 672 refers to any land, whether covered by water or not, which lies outside of this street, then there exists a large square, not numbered, which is embraced in the plan of the city (see Exhibit G. P. No. 11, Record, Vol. 6, p. 128), and in which those claiming title under Robert Peter have an interest under the provisions of the deed of trust from said Peter to Beall and Gantt.

The question as to whether those claiming under Robert Peter have any interest in the land lying south of the appropriation or reservation known as the Naval Observatory, depends upon the boundaries of said reservation, and the appellants claim that in the event of said reservation having a southern boundary line other than the river, all land outside of said line would also be held in trust for their use.

It is respectfully submitted that the opinion of the learned justice below (R. Vol. 7, pp. 2539 to 2542) is not based either on the law or the facts of the case.

The court asserts in said opinion that—

> "as the land was all within the river banks and beneath its waters, Mr. Peter never had any right to

> participate in its partition; for the Government derived no title to it from him, but became endowed with it in its capacity as sovereign."

This is not the view taken in 109 U. S. 686, where this court says—

> "undoubtedly Notley Young, prior to the founding of the city and the conveyance of his land for that purpose, was entitled to enjoy his riparian rights for his private uses and to the exclusion of all the world besides,"—

and riparian rights interpreted by the courts of Maryland (5 H. & J. 196), included the land covered by the river, and invested the owner of lands bounding on the river with the right to claim and hold said lands as the water receded from it, or as it was added to by alluvium, or by depositing earth and rubbish on the shore, or in the water between the shore and the middle bed of the river.

Such being the law as announced by this court and the courts of Maryland, the Government derived its title through the deed from Robert Peter, and was not, as the justice below holds, endowed with it in the capacity of sovereign.

In referring to the unnumbered square south of Square 22, the justice below said:

> "All of the latter square is within the bed of the river, as Mr. King stated would be the case in his letter to the commissioners of June, 1798, as was also the condition of a considerable part of square south of Square No. 12."

If the statement contained in the letter of the commissioners and the evidence offered by the appellants is correct, a part of the square south of Square 22 was high land. The commissioners, with knowledge of the existence of this high ground, stated that they had no objection to laying out a new square and dividing the same with Mr. Peter; and acting under similar circumstances the commissioners

did actually lay out a new square south of Square 12 and divide the same with Mr. Peter.

The justice below intimated that Lot 6 in Square 22 was assigned to Mr. Peter in adjustment of his claim to land south of Square 22, but there is no evidence that such was the case and nothing in the Record upon which to base such a conclusion.

It is not contended that the commissioners could give away land at their will, or bind the Government by any agreement; but it is contended that the Government is bound by the solemn agreement entered into with Mr. Peter when he made the conveyance to Messrs. Beall and Gantt; and that, as shown by the Record, Mr. Peter has an interest under the covenants and provisions of his deed in some of the land sought to be taken by the United States, and that in this cause it should be determined what is the right, title and interest of those claiming under Mr. Peter.

As to the Claim of the Marshall Heirs.

The fact as to whether or not the Marshall heirs have any equities as against the United States can not affect the claim of the Peter heirs.

When Mr. Peter executed his deed to Beall and Gantt, trustees, he held title in the land conveyed under ancient grants issued between the years 1664 and 1762, long prior to the Revolution and the confiscation proceedings subsequent thereto. His title was therefore derived not from the State of Maryland, but from the same source through which the Marshall heirs claim, and are consequently not affected by any equities that might possibly exist in favor of said heirs against the United States by virtue of the Treaty of Peace between the United States and Great Britain. The deed of Peter to Beall and Gantt being a conveyance upon specific trusts, did not deprive him of any rights he

might have under his original title to riparian rights, and so long as said trusts were not fully carried out, so long did the rights of Peter remain unaffected. As said trusts, so far as they affect the land lying south of Square No. 22, have not been fully carried into effect, the said land, with its appurtenances, including riparian rights, are still vested in the heirs of Beall and Gantt in trust for the use of Peter and the United States as expressed in said trust deed.

As to the Kidwell Claim.

If the contention that a portion of the property conveyed by Peter to Beall and Gantt is still held subject to the provisions of said trust, and that the respective rights therein are unadjusted as between Robert Peter and the United States, is correct, it follows that the United States had no power to issue a patent to Kidwell, or any other person, of such property, especially if any part thereof embraced in said patent fell within the limits of the city.

As to the Claim of the Chesapeake and Ohio Canal Company.

There is no evidence that the canal company ever acquired title to the land south of Square No. 22, or to any of the land claimed by the Peter heirs, either by deed or condemnation. As under the charter of the company title could be acquired only by deed, or condemnation and payment of the jury's valuation, the company has no title recognized by its charter. The company admits that it has but a possessory title, but claims the land south of Water street and opposite Square No. 22, both as against the Peter heirs and the United States, under claim of exclusive and uninterrupted occupancy for fifty years.

It is well settled that the statute of limitation and adverse possession cannot run against the United States.

Gibson *vs.* Chouteau, 13 Wall. 99.

Under the deed from Peter, Beall and Gantt were constituted trustees for the United States and Robert Peter jointly, and held the land conveyed upon the trusts expressed in said deed and for no other purpose whatsoever. As limitations would not run against the United States it would not run against a trustee holding for its use, for the State ought not to suffer for the negligence of its agents, officers or servants.

So long as the trusts reposed in said Beall and Gantt were not fully carried out, and the respective rights of Peter and the United States in the land conveyed fully settled, the statute would not run. If the land south of Upper Water street is in the city, it was to be divided between Mr. Peter and the United States; if not included in the city, it was to be held by the trustees and reconveyed to Peter, but until the question as to whether or not such land is in the city is settled, neither the division nor reconveyance can be required.

The rights of the Peter heirs in said land could not be affected by any act of Congress authorizing the construction of the canal, as the conveyance distinctly set forth the trusts reposed in Beall and Gantt, and the extent to which the United States was interested thereunder, and nowhere is any authority given to either the trustees or the United States to dispose of the interest of Mr. Peter otherwise than as provided for in the deed.

It was never contemplated that the canal company should acquire land other than such as was necessary for its works; and the Act of the 3d of March, 1837, which provided that if it became necessary to form heavy embankments along the river shore, and it should be deemed expedient to give greater strength to the same by widening

them, the ground so formed for such purpose might be sold, would seem to limit the extent of land to be held by the company to so much only as was necessary for its preservation. The canal was intended for an internal avenue of trade, and the reason which gave riparian rights to owners of land along the shore, namely, that they might have access to the navigable part of the river, could not reasonably be held to apply to land held for the use of the canal.

ENOCH TOTTEN,
J. HOLDSWORTH GORDON,
ARTHUR PETER,
Solicitors for Peter Heirs.

IN THE

SUPREME COURT OF THE UNITED STATES.

MORRIS AND OTHERS

vs.

UNITED STATES.

Brief of James V. Brooke and John Howard for the Heirs of John Marshall.

STATEMENT.

The record in this important and extraordinary litigation (commonly known as the "Potomac Flat Case"), embraces, with its pleadings, numerous maps and extensive evidence, seven volumes of printed matter, in which many different interests and parties appear; but the controversy between the United States and the Marshall heirs, including those of John Marshall, the great Chief-Justice of this court, occupies comparatively small space, though the claim involved is the largest of any, and concerns the title, subject to public rights, of the bed and waters of the Potomac, to the high water-mark, as the river flows by the City of Washington and the District of Columbia.

The suit was brought in the name of the United States under an Act of Congress of August 5, 1886 (24 Stat. 325), requiring the Attorney-General to institute, in the Supreme

Court of the District of Columbia, a suit against all persons or corporations having, or pretending to have, any right or interest in any part of the land or water in the said district, (within the limits of the city of Washington, or exterior to the said limits, and in front thereof to the channel of the Potomac, and composing any part of the land or water affected by the improvement of the river, or its flats, in charge of the Secretary of War), for the purpose of establishing the right of the United States thereto, or of making payment for any of said property which should be judicially ascertained to belong to any of the defendants; and it was provided that the suit should be in the nature of a bill in equity, and it was, of necessity, therefore, in the nature of a bill *quia timet*, though perhaps not in all strictness to be governed by the rules applicable to such a bill, but rather in accordance with the general principles of equity jurisprudence.

The United States had taken possession, or assumed control, as far as possible, of the premises, and had erected valuable buildings or made other improvements on parts thereof; and, on the other hand, the valuable property claimed by the Marshall heirs was of such a nature as not to admit of actual, but only of constructive possession, and as to none of the property could any court have acquired jurisdiction as against the United States without its consent; and consent was not given, or an opportunity afforded, for the assertion of any rights against the Government, until the bill was filed in this suit on the 26th of November, 1886. Rec., Vol. I, p. 1. And thus no statute of limitation, or plea of *laches*, could avail against any claim, except, possibly, from the filing of the bill and the service of process upon the parties sought to be affected by the suit; and hence, very properly, no such defence is set up in the bill or in the pleadings, as to any claim. And, indeed, under the circumstances, and particularly as to the Marshall heirs, any such defence would not only have been highly unjust, but in direct contraventiou of the whole equitable purpose and scope of the Act of Congress, and the proper function of a bill filed in fulfilment of its objects.

The proceeding, indeed, is of a peculiar, if not of an anan-

olous character, and, especially as to an important class of claims, places the claimant at great disadvantage. For, as to these, the Government is suing to establish its supposed rights without specifically asserting any right, or stating the grounds upon which it is based, or putting in issue any matters of law or fact in a form to be legally met and contested; but, on the contrary, having assumed possession, as it were, by a *coup-de-main*, has called upon these claimants to show their claims, without showing its own. Obviously, if any person was in unlawful possession of real estate belonging, or claimed to belong to the Government, its regular and proper remedy would have been an action of ouster—ejectment or otherwise; and in such an action, the Government would have had to stand upon the strength of its own title and not upon the weakness of its adversary's. But it has undertaken to reject and reverse the established laws of pleading and practice, and to throw upon its citizens the burden it ought itself to have assumed and borne, and without disclosing any title or ground of claim on its part.

Such is the case as to the claim of the Marshall heirs. The Government does not in its bill, or in any pleading assert any title, or the grounds of any title, to any part of the property embraced in this claim, but filed what, without discourtesy, may well be designated a "fishing bill," and, upon a preliminary hearing, disclosed its hand, for the first time, and *arguendo* by its counsel. Besides the great disadvantage of the reversal of the proper positions of the parties in the litigation, the difficulties of the Marshall heirs in learning what was to be asserted against them, and of consequence, in making defence thereto, are sufficiently illustrated by the necessity of filing two separate and distinct amended and supmental answers, by James M. Marshall's heirs, in addition to the original answer filed by them to the bill. (Rec., Vol. I., p. 66, p. 331, p. 336.) These hardships, so well calculated to operate injustice, were unintentional, no doubt, and seem to have sprung incidentally from the nature of the proceedings, though certainly not, it must be presumed, within the contemplation of the equitable and laudable act of Congress.

The difficulties were, nevertheless, real and great, and should be borne in mind in the adjudication of the rights of the parties.

As above indicated, the claim of the Marshall heirs is to the soil of the bed of the Potomac and its waters to the high-water mark, to the extent of the flow of the river by the city of Washington and the District of Columbia, subject to the public rights of fishery and navigation, and the constitutional power of Congress to regulate commerce with foreign nations and among the several States.

The legal title to this property was vested in James Markham Marshall, but in trust, as we claim, in respect to one-half interest for the benefit of his brother, John Marshall, whose heirs having heard of the pendancy of this suit, came in by petition and were made parties-defendant, and filed an answer to the bill, setting up their claim and adopting the defences made by the heirs of James M. Marshall. (Rec., Vol. I, pp. 364–365).

As this claim now appears before this court, the controversy is between the United States and the Marshall heirs, and the parties stand as suitors upon a perfect equality. The United States is not suing in its sovereign or political capacity but simply as a claimant to property, its title to which is contested by its citizens. It claims through the State of Maryland, which by an act of its legislature ceded to it, in 1791, that part of its territory "called Columbia," which was within the limits of that State, "in absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon," but with the *proviso* "that nothing herein contained shall be so construed as to vest in the United States any right or property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States." Laws of Maryland, 1791, chap. 45; Supplements, Nov., 1792, chap. 59; 1793, chap. 58.

It is not pretended that any individual has attempted to transfer to the United States the *locus in quo*, and therefore its claim stands exclusively upon the title, if any, that Maryland

conveyed or had the right to convey. And here it should be remarked *in limine* that no question of political jurisdiction or government is involved in this litigation ; and especially should it be remarked that the rights of the Marshall heirs have never been, and could not have been, affected by any act of the State of Maryland or of the State of Virginia, or by any stipulation or agreement made between the States looking towards an assertion or a settlement of the jurisdiction of either State or of the boundary line between them. All of such matters were of a political character merely, and neither State had any power or has ever attempted by agreement or otherwise to cede away or in any manner to impair the property rights of private citizens, wherever and however a political boundary line might be drawn between the two States. On the contrary, in every act looking towards the settlement of the boundary line, each State has been particular to reserve and to protect all of the property rights of its citizens; and the same persistent caution was continued in the late Acts of Assembly in Maryland and Virginia (1874), by which the settlement of the boundary line between them was submitted to a Board, or Commission, of Arbitration, and to the award and final agreement under which Congress gave its formal consent, by an Act of March 3d, 1879 (20 Stats. 481). (In an appendix to the brief of counsel for the United States, filed in the court below, and which it is presumed will be filed in this court, may be found conveniently collected, copies of the Acts of the two States and of the Act of Congress.)

And herein, it is respectfully submitted, consists a fundamental error running through a most important part of the opinion of the learned court below, which is largely founded upon the legislative and political acts of the two States. Such legislation, and the whole range and course of action of the two States in making grants to its citizens and others, of lands within the supposed limits of the contested political boundaries, were very properly adduced before the board of arbitration above mentioned, as evidence to show what each State respectively claimed through a long series of years, as territory within its jurisdiction, to enable that tribunal, to discover

and to decide the true political line of division. The same facts and considerations would seem to have been transferred to this litigation, which is concerned not with questions of political sovereignty and jurisdiction, but with private rights of property, and which would have remained the same wherever the political line of division might have been finally traced, and so would have remained the right of jurisdiction of the United States in and over the Potomac. But its alleged title to the bed of the river and its waters, as property, is a very different thing.

Having thus eliminated from the case the extraneous elements with which the true issues have been mixed up and confused, let us now inquire—

I. As to the title of the United States to the *locus in quo*.

II. As to the title of the Marshall heirs.

The United States claims title through the State of Maryland, and in the court below the title of Maryland was placed upon two grounds:

(1). The charter granted by Charles I, in 1632, to Cecilius Calvert, Baron of Baltimore, as Proprietary of the Province of Maryland, of whose title, at the time of the Revolutionary War, of 1776, Henry Harford was the owner as successor to Frederick Lord Baltimore, the last Proprietary.

It was claimed that the title to the Potomac, which was vested in the Crown, did not pass to Lord Baltimore by the charter, but remained in the Crown as a branch of the *jura regalia*, or royal prerogative, and at the Revolution devolved upon the State of Maryland, as successor to the rights of the Crown. But the charter, as construed by the Court of Appeals of Maryland, "clearly passed" to Lord Baltimore, and his heirs and assigns, "the property in the soil covered by any of the navigable waters within the limits of the charter," and "who thus became owner of the soil, subject to the common right of fishery and navigation, and had full power and authority to dispose of it." *Brown* v. *Kennedy*, 5 Har. & Johns., 195 and 204, *et seq.* If so, the title to the Potomac river was vested in Henry Halford as the successor and last representative of Lord Baltimore, and it certainly was not in the Crown

at the time of the Revolution, and could not have devolved upon the State of Maryland as successor to its rights, which had thus long before been granted away.

The title of Maryland had, therefore, to be placed upon another ground—the ground of alleged confiscation of all the property of British subjects, and especially of the property of Henry Halford, as "enemy property," by the sweeping, broadcast legislative *ukase* of Maryland in 1780–81. Of course, these two grounds of title are wholly incompatible with each other—since of necessity the validity of either excludes the existence of the other—the first being that the title did *not* pass to Lord Baltimore and his heirs and assigns, but devolved upon Maryland as the successor to the rights of the Crown, and the second that it *did* pass, but was vested in Henry Halford, and was duly confiscated by the State of Maryland to itself.

It will hereinafter be shown that this Court has differed from the Court of Appeals of Maryland in its construction of a charter quite identical in its terms with those of the charter to Lord Baltimore, and held that title to the soil of navigable rivers did not pass to a similar Lord proprietor, but remained in the Crown; and it will also be shown, we think, that the terms of the subsequent charters under which we claim are alike much broader and more specific than those of the Baltimore grant, and include the Potomac river and its bed and waters, and that, in so far as the Maryland title is dependent upon confiscation, the whole proceedings were void and the title of Henry Halford is now vested in the Marshall heirs.*

---

* In this connection, it may be pardoned to remark as a singular fact that neither in the able brief of Mr. Hugh T. Taggart, special counsel for the United States, filed in the court below (of which he has kindly furnished us a copy), nor in the elaborate opinion of that court, is any reference made to the case of *Brown* v. *Kennedy*, above cited, or to the very learned and separate opinions delivered by the different members of the court, discussing and deciding the right of the King to grant title to navigable waters and the soil under them, and the effect of the grant to Lord Baltimore.

It is proper to add that, in *Brown* v. *Kennedy*, one of the judges (Chase, C. J.) expressed the opinion (p. 202) that Maryland is invested with all the rights within the boundaries of the charter to Lord Baltimore as the King of Great Britain ever did or could enjoy, and that the syllabus of the report states that as the decision of the court. But no other judge expressed any opinion upon the subject, and that of Chase, C. J., was purely *obiter dictum*, as no such question arose in the case.

Title of the Marshall Heirs.

II. Charles II, while in exile, in the first year of his reign (counting from his father's death, which occurred in January, 1649), granted, on September 18, 1649, to Lord Hopton and others what was subsequently known as the "Northern Neck," and its rivers and islands. After his restoration this grant was surrendered in order that it might be renewed with alterations, and the same property was granted by Charles to the Earl of St. Albans and others, by letters patent of the 8th of May, 1660. Thomas Lord Culpeper having afterwards purchased the property from its grantees, and become "sole owner and proprietor in fee simple," King James II, by letters patent of September 20, 1688, reciting the two former patents, granted and confirmed the same territory in fee simple to Lord Culpeper, his heirs and assigns forever. The two grants of Charles II are not copied in the record of this case, but the patent of grant and confirmation of James II, which recites those patents, and grants the property as therein described, is given in full (Rec., Vol. III, pp. 1128–1132), which description, for convenience of reference, will presently be transcribed. The property afterwards descended to Thomas Lord Fairfax as the heir-at-law of Lord Culpeper. Rec., Vol. III, 1136. By the will of Lord Fairfax, the property was given to Denny Martin, upon condition of his taking the testator's name, which was done, under an act of Parliament. Rec., Vol. III, 1136, *et seq.* By deed of 13th August, 1797, Denny Martin Fairfax conveyed the property to James Markam Marshall, of the city of Richmond, Virginia, as above stated, in trust for the joint benefit of his brother and himself. Rec., Vol. III, 1312, *et seq.*

That these two brothers, James M. and John Marshall, residing in the same city, and one of them the greatest jurist of modern times, if not of all time, did not investigate the title and know what they were about when investing their money in so great a purchase, is simply incredible, and it will be shown, we submit, that their judgment was well founded.

And now as to the description and identification of the property.

The property, as described in the letters patent of James II, is as follows:

"All that entire tract, territory or parcell of land scituate, lyeing and being in America, and bounded by and within the heads of the rivers Tappahannock als., Rappahannock and Quirough or Patawomeck rivers, the courses of the said rivers, as they are commonly called or knowne by the inhabitants and descripcons of those parts on Chesapeyock Bay, together with the rivers themselves and all the islands within the banks of those rivers." (Rec., Vol. III, p. 1128). And afterwards, on page 1130, the property is described as being in Virginia, in America, and as containing "the said rivers themselves" (of which the Potomac was one), and all the islands within the outermost banks thereof, and the soil of all and singular, the premises and all lands, etc., and "waters, rivers, ponds, pools, lakes, water courses," etc. And then, in the conclusion of the grant (page 1132), there is this express declaration as follows: "Lastly, wee doe, for us, our heirs and successors, declare and and grant that these our patents, or the enrollment thereof, shall be in and by all things firme, valid, sufficient and effectuall in the law, according to the tenor and true meaning of the same, *notwithstanding the not describing and setting forth, or not rightly or truly describing or setting forth of the said tract, territory or parcell of land* or any *other, the premises* hereby granted, or of the buttings, boundaries, or *scituacon* (situation) of the same, or of any part thereof, or of any tennants, farmers or occupiers of the premises, or any part thereof, or *any other defect, omission,* and *non-recitall* and *mis-recitall, uncertainty* or *insufficiency in these our last letters patents,* or any act, statute, ordinance, provision, usage, custom, restriccon, or any other matter, cause or thing whatsoever, to the contrary in anywise, notwithstanding and although express mencon," etc. Well might this court say of this grant, in a case that will be cited, that nothing could be more comprehensive and explicit in its terms.

The devise to Denny Fairfax was equally comprehensive in its terms. It was not confined to "one-sixth part" of certain property, but embraced in a general residuary clause, all else

that the testator then owned, in the following language: "Together with all my other lands and tenements I have, am possessed of, or have a right to, in the said Colony of Virginia." (Rec., Vol. III, 1136).

Such is the chain of title of the Marshall heirs to the soil and waters of the Potomac, to high-water mark, as the river flows by the city of Washington and the District of Columbia, subject to public uses, as explained, and such the broad terms through which that title is traced to Charles II and James II. The court below decided against the claim of the Marshalls, and held that the United States has absolute title to the *locus in quo*. (Rec., Vol. VII, 2549). Appeals were duly taken (*Ibid.* 2572, 2590), and the rendition of that decree is assigned as error.

Argument.

The United States is understood to claim:

1st. That the Crown of England had no power to grant navigable waters and the soil under them as property.

2d. That if there was such right in the Crown, it was exercised in the grant to Lord Baltimore, which was prior to that to Lord Culpeper.

3d. That all the property of Lord Baltimore was confiscated by the State of Maryland, and that this portion of it was ceded by Maryland to the United States.

It is thus apparent that there are but four questions to be raised—viz.:

First. Had the Crown the right to grant navigable waters, and the soil under them, to a subject?

Second. Did the grant to Lord Culpeper embrace the property in litigation?

Third. Was the property embraced in the prior grant to Lord Baltimore?

Fourth. If it was embraced in the grant to Lord Baltimore, and was vested in Henry Harford at the time of the Revolution, was it legally confiscated to the use of Maryland?

This court has decided three of these questions favorably to the Marshall heirs.

It is conceded in the brief of the learned counsel for the United States in the court below, and cannot be successfully

denied, that the Potomac river is included in the Culpeper (or Northern Neck) grant, the language of the grant being "*together with the said rivers themselves, and all the islands within the outermost banks thereof, and the soil of all and singular, the premises thereof.*"

But it is claimed that the Crown had no right to grant navigable waters, and the soil under them, and, in support of this claim, the United States relies mainly upon the decision of this court in the case of "*Illinois Central R. R. Co.* v. *Illinois.*" (146 U. S. 452.)

It is respectfully submitted that, conceding this court to have held that the State of Illinois had neither right nor power to grant the bed of navigable waters, in that case and under its circumstances, such decision would be no authority in this case.

The question here involved is not the power of a State to make such a grant, but the power of the Crown of England to make this grant at the time it was made. The right of the King in times past cannot be destroyed or made ineffective by reason of the modern outgrowth of civilization and commerce under totally different conditions arising in this hemisphere centuries afterwards. We have thus nothing to do with the power of the States or the *general government.* The only question is, Had the Kings of England the power to "grant, as private property, navigable waters, and their beds, subject to public uses?"

This question, it is respectfully submitted, has been decided by the court favorably to the Marshall heirs. This is what it has said:

"According to the theory of the British Constitution, all vacant lands are vested in the Crown as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain." (*Martin et al.* v. *Waddell,* 16 Peters, pp. 109–10.)

As to whether the Crown, since "Magna Charta" had the right to grant to the subject navigable waters and the soil

under them, so as to give him an immediate and exclusive right of fishery, either of shell fish or floating fish, within the limits of the grant, this court, in the case of *Martin et al.* v. *Waddell*, declined to decide, as not being necessary for the purposes of that case, remarking, however, that the question was not free from doubt, and that the authorities in the English books could not, perhaps, be altogether reconciled, but the right to grant the soil under the water would seem to be conceded. And in a more recent case, the court, referring to the diversity of view as to the scope and effect of the previous decisions of the court upon the subject of public and private rights in land below high water mark of navigable rivers, said: "*This appears to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject.*" (*Shively* v. *Bowlby*, 152 U. S., p. 10, *et seq.*)

This case may, then, be treated as a decision upon this very question of public and private rights in land below high water mark of navigable rivers; and, in the consideration of former decisions of this court and other authorities, the opinion proceeds:

"1st. By the common law, both the title and dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all lands below high water mark, are under the jurisdiction of the Crown of England *and in the King.* Such waters, and the lands which they cover, either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature for highways of navigation and commerce, domestic and foreign, and for purposes of fishing by all the King's subjects.

"Therefore, the title *jus privatum* in such lands belongs to the King as the Sovereign, and the dominion thereof *jus publicum* is vested in him as the representative of the nation and for the public benefit."

(It is here pertinent to remark, in explanation of the language "belongs to the King as the Sovereign," that the King can own nothing as an individual. All the property owned by him at the time of his accession to the throne he owns after-

wards as king, because the individual is merged in the sovereign. 6 Comyn's Dig., title "Prerogative" D. 64; Skinner's Rep., 603).

The court proceeds thus:

"The great authority in the law of England is Lord Chief Justice Hale, whose authorship of the treatise *De jure Maris*, sometimes questioned, has been put beyond doubt by recent researches.

"In that treatise, Lord Hale, speaking of the king's right of property or ownership of the sea and the soil thereof under his jurisdiction, lays down the following proposition:

"'The right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste, whereof he is lord, or as the right of fishing belongs to him who is the owner of a private or inland river.'

"But though the king is the owner of the great waste, and, as a consequence of his proprietary, has the primary right of fishing in the sea, or creeks or arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless such places, creeks, or navigable rivers where either the king or some particular subject hath gained proprietary exclusive of the common people," "yet they may belong to the subject in point of proprietary, not only by charter of grant, whereof there can be but little doubt, but also by presumption and usage. But though the subject may thus have the proprietary of a navigable river, part of a port, yet these cautions are to be added:

"2d. That the people have a public interest, a *jus publicum* of passage and repassage of goods by water, and must not be obstructed by nuisance; for the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects, as the soil of a highway, which though it may, in point of property, be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified. When a post is

fixed by the license or charter of the king, or that which presumes or supplies it, viz: custom and prescription, though the soil and franchise or dominion thereof be in the king, or, by derivation from him, in a subject, yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners, in peace with the kingdom, are interested by reason of common commerce, trade and intercourse.

"In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or arms of the sea below ordinary high water mark, is in the king, except so far as an individual or a corporation has acquired title in it by express grant or by prescription or usage; and that this title, *jus privatum*, whether in the king or a subject, is held subject to the public right, *jus publicum*, of navigation or fishing.

"3d. The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority and with his consent, they were held by the king as the representative of and trustee for the nation, and all vacant lands, and the exclusive power to grant them, vested ever in him. The various charters granted by the various monarchs of the Stuart Dynasty for large tracts of territory on the Atlantic Coast, and distinct grants of the navigable waters and the soil under them, as his own property, carried to the grantees both the territory described and the powers of government, *including the property and dominion of land under tide waters.*"

This decision settles definitely the power of the king to grant the navigable waters and the lands under them to a subject—that is, to grant the *jus privatum* and the *jus publicum, or either*, with the result that the grantee holds the *jus privatum* just as the king did, subject to the *jus publicum*. And in the case of *Fairfax's devisee* v. *Hunter's lessee*, this court decided that very question—that is, that the Crown did grant the Potomac river and the soils under it to Lord Culpeper, as will presently be seen.

Thus we have established the right of the king to grant both the legal title to navigable waters and the lands under

them *as property*, and the *jus publicum* as part of the *jura regalia*.

The second inquiry is as to which of them was conveyed in the Northern Neck grant.

This, too, would seem to have been settled by the decisions of this court.

In the case of *Fairfax's devisee* v. *Hunter's lessee* (7 Cranch, p. 503), the court says:

"The first question is whether Lord Fairfax was proprietor of and seized of the soil of the waste and unoccupied lands in the Northern Neck by virtue of the royal grants (2 Charles II and 4 James II), or whether he had seignioral rights as lord paramount, disconnected from all interest in the land except for sale or alienation. The royal charter expressly conveys all that entire tract, territory and parcel of land situate, etc., together with the *rivers*, islands, woods, timbers, and mines, quarries of stone and coal, etc., to the grantees, their heirs and assigns, *to their only use and behalf, and to no other use and behalf, interest or purpose soever*."

"It is difficult to conceive terms more explicit than those, *to vest title and interest in the soil itself*. The land is given and the exclusive use thereof, and if the union of the title and the exclusive use do not constitute the dominion *directum et utile*, the complete and absolute dominion in property, it will not be easy to fix on anything which will constitute such dominion."

"We are, therefore, satisfied that, by virtue of the charter and the intermediate grants, Lord Fairfax, at the time of his death, had the absolute property of the soil of the land in controversy, and the acts of ownership exercised by him over *the whole waste and unappropriate lands*, as stated in the case, vested in him a complete seizin and possession thereof. *Even if there had been no acts of ownership proved, we should have been of the opinion that, as there was no adverse possession, and the land was waste and unappropriated*, the legal seizin must be, upon principle, considered as passing with the title."

Thus the court decided that the Northern Neck grant included the *rivers* and the soils under them, and that the grantee had constructive possession, as well as the legal title.

And then the court proceeded further to decide that Denny Martin Fairfax, under the devise of Lord Fairfax, took his title. *Denny Martin Fairfax was the grantor of the Marshalls*, as above shown.

It has thus been shown by the decisions of this court, 1st, that the Crown had the right to grant navigable waters and the soil under them as private property, subject to public uses, and that it did grant the Potomac river and the soil under it to Lord Culpeper, through whom the Marshalls derive title. 2d, that the title granted is *jus privatum* for the grantee's *own use, and no other purpose whatever*, except the limited *jus publicum*, as explained.

The next question to be considered is this: In what respect does the "Northern Neck" grant differ from the New Jersey and Maryland grants?

This difference was defined and adjudged by this court in the case of "*Johnson* v. *McIntosh*" (8 Wheat, p. 543), in which the court said:

"Thus has our whole country been granted while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In the governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the Crown or was vested in the Colonial government, the King claimed and exercised the right of granting lands, and of dismembering the government, at his will. The grants made out of the two original colonies, after resumption of their charters by the Crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and parts of Carolina, were then created. In all of them the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on those grants. In some instances, the soil was conveyed by the Crown, unaccompanied by the powers of government, as in the case of the *Northern Neck grant*." 8 Wheat, p. 580.

This distinction between grants of property, unaccompanied by the powers of government, and grants accompanied with

the powers of government, is the pivotal point in this case, in respect to the claim of priority for the Maryland grant over the Virginia grant, and this involves the question: Was the *jus privatum* in the Potomac river, and the soil under it, thus shown and conceded to have been conveyed in the Northern Neck grant, embraced in the prior grant to Lord Baltimore? If it was not, then it was not affected by the confiscation of Lord Baltimore's property (supposing the Maryland acts of confiscation to have been valid, which we deny), and it was not the property of the State of Maryland, through whose grant the United States intimates a claim to it.

The New Jersey and Maryland charters are almost identical. The rights and powers of the Duke of York under the one, and of Lord Baltimore under the other, were the same. This court, in the case of "*Martin* v. *Waddell*," *supra*, decided that the New Jersey title did not convey the *jus privatum* of navigable waters, and the soil under them, to the Duke of York, although the language and terms of the grant were sufficient for that purpose, if such had been declared to be the intention of the grantor.

The force and effect of the decision is in this: that it holds that where the grant invests the grantee with governmental powers, and also uses terms embracing property in navigable waters, and the soil under them, such soils and waters pass only as *jura regalia*, as incident to the powers of government, and therefore the *jus privatum* still remained in the grantor (the Crown), subject to the *jus publicum* vested in the grantee.

If this was the law of the New Jersey grant, it must be the law of the Maryland grant.

That it was the law of the New Jersey grant, and the law that ruled the case, was clearly and specifically decided. This is the language of the court:

"The questions upon the charter are whether the dominion and property in the navigable waters, and the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the Duke? Whether, in his hands, they were intended to be a trust for the common use of

the new community about to be established, or private property, to be parcelled out and sold to individuals, for his own benefit.

"It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community, and in that light it should be regarded and construed. * * * No words are used for the purpose of separating them from the *jura regalia*, and converting them into private property, to be held and enjoyed by the Duke, apart from and independent of the political character with which he was clothed by the same instrument * * * and in the judgment of the court, the land under the navigable waters passed to the grantee as one of the royalties incident to the power of government, and were to be held by him in the same manner, and for the same purpose, that the navigable waters of England, and the soil under them, are held by the Crown."

Now, if Lord Baltimore, who, like the Duke of York, was granted both proprietary and governmental powers, held the Potomac river, and the soil under it, only as the Crown held them *before* the grant to his Lordship, and if, before the charter, the Crown had the right to grant the *jus privatum* or property in the river, and the soil under it, to Lord Culpeper, what was there to prevent the Crown from making such grant, *after* the grant to Lord Baltimore? It must have remained in the King; and if so, he had the right and power (as we have seen) to grant it to another as an inalienable right incident to the *dominicum directum et utile*, which the court has decided to have been vested in Lord Culpeper by the grant to him.

We confidently rely upon these decisions as establishing:

1st. That the Crown had the right to grant, and did grant, the Potomac river, and the soil under it, to Lord Culpeper; and, 2ndly, That it did not grant it to Lord Baltimore.

If, as we maintain, the authorities referred to establish the title of the Marshall heirs to the Potomac river and its soil, under and by virtue of the deed from Denny Martin Fairfax to James M. Marshall, their rights must be protected by this

court, unless it appears that they have, in some way, lost their rights. There is nothing in the record which indicates in any degree such loss. In answer to the criticism, that they have made no claim for nearly one hundred years, it is sufficient to say that during that period there has been no adversary possession against which to assert such claim; but that during that whole period they have been in the constructive and undisputed possession of the property. The United States does not claim by adverse possession. Nor it does not claim title in this soil and its waters, save *arguendo*.

The government, desiring to occupy this property for public use, has recently gone into possession of it and built upon it structures of great value, and has, by its legislative, judicial and executive departments, recognized the existence of the claim of others to the land, and by an act of the legislature, procured by the executive department, established a special judicial tribunal, before which the claimants are allowed and invited by the act to set up their respective claims. In pursuance of this invitation, the Marshall heirs have appeared, and have (as respectfully submitted) established their title to the property. The government has not, and could not, have pleaded the statute of limitations, or laches, or non-user, or any other forfeiture of their property.

It can hardly be contended that the owner of lands failing, through inability, or unwillingness, to improve and develop them, can be *improved* out of them by the act of a stranger having no reasonable claim of title.

After the United States went into the occupation of the property of appellants, they could not have sued the government without its permission. The government has, by this act of Congress, and this bill in chancery, not only given the appellants the right to set up their claim in this suit, but required them to do so or be forever barred. This is a waiver upon the part of the government of the defence of the statute of limitations and laches, and an admission, " in judicio," that they were not yet barred. This has been decided by this court in the case of the " *United States* v. *Clark* (96 U. S., p. 37), and see specially page 43.

In the case at bar, the appellants are required, by an act of Congress, to show now, in this suit, their title to the land. Under that act and in response to the bill they show their title. Can the United States defend on the ground that the appellants have not shown it sooner, when there was no occasion for their doing so, and when the act and bill confers upon them the right to do it now?

The United States does not, in its bill or otherwise, claim to own the bed of the river and its waters by virtue of adverse possession or by non-user of these claimants.

But suppose the United States did, as some of the defendants do, claim against the Marshall heirs by adverse possession or non-user.

This court has settled that question in the case of "*Lecrow* v. *The City of Boston.*" (17 How., 118.)

In that case, the riparian owners claimed that the city having permitted them to use the water for dock purposes for so long a time was evidence of dedication to the public of the land covered by the water. In exposing the error of that criticism, the court said:

"The exercise of the public right of navigation over the soil of defendant is fully accounted for without presumption of grant or dedication by the owners. The public enjoyed this liberty of navigation by a title far above the advent of the pilgrims and paramount to any grant to them or by them, but by the law the enjoyment of this public right was made defeasible by the owner of the land. Till he reclaimed his land, the public needed no grant or dedication in order to the enjoyment oft he right of navigation over it. The owner was not bound to exercise his right within a given time or forfeit it. A man cannot lose the title to his lands by leaving them in their natural state without improvement, or forfeit them by non-user."

In this case, where the bed of the river up to high-water mark belongs to the Marshalls, the doctrine of riparian rights has no application. These wharf-owners have no property abutting on the Potomac river. Their lands abut on the lands of the Marshall heirs. The doctrine of riparian rights is

based on the theory, that the bed of navigable waters being the property of the Sovereign, the Sovereign permits the riparian owner to use the waters over the land for the better enjoyment of their property. The land, the bed of the river, is not appurtenant to the land of the shore.

If the bed of the river, up to high-water mark, belongs to the Marshall heirs, whenever they choose to reclaim it by building on it, though such erections should destroy the wharves built by those claiming as riparian owners, the exercise of this right, though destructive of the wharf-privileges of the adjacent owners, would be "damnum absque injuria." (17 Howard, 118.)

It is only proper to add that if the Potomac river, and the soil under it, was included in the Maryland grant, and was never forfeited by Lord Baltimore, or legally confiscated by the confiscation legislation of Maryland, then it remained in the heirs of Lord Baltimore, and was by them conveyed to the Marshall heirs by Robert Washington, attorney in fact. Rec., Vol. III, 1169, *et seq.*

As to the Maryland acts of confiscation, we deny the validity of that legislation and of any title claimed thereunder. The power of confiscation of "enemy property" is a power *de jure belli*, and attaches to, and can be exercised only by, one sovereign and independent nation, at war with one another, or standing in such an attitude toward each other, and then only in accordance with the law of nations, of which the right is a part, and by proceedings judicial in their nature.

In the war between the United States and the late Confederate States, the conflict soon assumed such a magnitude that of necessity belligerent rights were equally accorded to both parties, as in the case of an international war between regularly recognized nations.

The United States exercised two different powers, and by proceedings appropriate to each municipal and national powers, and among these last the power of capture, seizure, and condemnation of the property of citizens or residents of the Confederate States, on sea or land, as "enemy property," and as such subject to appropriation by right of war. But in

all such cases, as the right was exclusively derived from the law of nations applicable to belligerents, so the proceedings of condemnation and appropriation had in exercise of the right, were in accordance with the requirements of that law, and were strictly judicial, after notice, citation and monition, and though, as the circumstances were peculiar, Congress in its legislation regulated the exercise of the right, and prescribed the modes of procedure, and designated the courts in which jurisdiction was conferred (all of which had in substance often been done by other nations), the right was, from first to last, claimed and exercised, as a belligerent right, under the law of nations, and from the fundamental requirements of which, in no respect, was there any departure.

See the Price Cases, 2 Black; *Miller* v. *United States*, 11 Wall, 268; *McVeigh* v. *United States*, 11 Wall, 259; in which latter case, when McVeigh had appeared, and his appearance had been dismissed, and he had been denied a hearing in the court below, this court unanimously said: "It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Yet that was precisely what the high-handed and arbitrary Maryland legislative edict attempted to do *de jure belli!* And it is observable that no such grotesque and absurd attempt was made by the United States, as Maryland made, to combine, in mongrel fashion, the exercise of two utterly different powers, and to execute an international war power, requiring judicial proceedings, in the mode of a municipal, forfeiture requiring none.

But since the power of confiscation is a power *de jure belli*, and to be exercised only *inter gentes*, the validity of its exercise by Maryland, however conducted, depended upon the assumption that the Colony, or so-called "State," of that name, was a sovereign and independent nation at the time, and, as

such, was, in its individual capacity, waging war with England.

But nothing of the sort appears. On the contrary, directly the reverse appears. There never was a time when Maryland was such a nation, or waging such a war.

There never was a time when Maryland was a sovereign, and distinct nationality, or was recognized as such by foreign nations as an independent unit among the family of nations, or waged war in that capacity. The War of the Revolution was what its name imported—a revolution as to the assumption and exercise of the powers of an independent government and nation, known and recognized then, and ever since, as the United States. It was not a war in any sense by any one Colony, or "State," against England, but a war between the United Colonies, or States, all combined, and as a separate nation, as to England and all other nations, and as such was represented in Congress assembled by delegates duly appointed, to adopt and conduct measures for the common purpose and defense of the whole.

As early as June, 1775, the United Revolutionary Colonies had in Congress adopted the Massachusetts troops as a part of the Revolutionary Army, and had appointed George Washington as Commander-in-Chief of all the Continental forces raised or to be raised, and he promptly took command at Cambridge, and was in such command when the Declaration of Independence was made by the United Colonies in July, 1776, and continued in command of all such forces until the triumphant close of the war, and under and by that authority alone. And soon seeing the necessity of prize courts for the adjudication of captures of British vessels and their cargoes as enemy property, Washington recommended to Congress the establishment of such courts, which was promptly provided for by an act passed in November, 1775, with appellate jurisdiction in Congress, and thus an international war was recognized and carried on as well by sea as by land, and with a national tribunal of supreme jurisdiction in prize cases. Washington never waged war, nor did the Congress of the United Colonies or the United States, ever wage war with England, or achieve independence, in any other capacity than as the duly author-

ized representative of all of the local political communities combined, as one nation, and the treaty of peace with England was made by the United States in the capacity and solidarity of a separate and independent nation, composed of its several local political communities, called States, by way of designation.

In the great case of *Penhallow et al.* v. *Doane*, 3 Dall., pp. 80, 81, involving the right of adjudicating prize money in a case of capture as between a State and the United States, Mr. Justice Paterson, in speaking of the nature of the war between the United States and Great Britain, and the power by which it was exercised, well said: "It was lodged in, and exercised by, Congress; it was there, or nowhere; the States, individually, did not, and with safety could not, exercise it. Disastrous would have been the issue of the contest, if the States, separately, had exercised the powers of war. For, in such case, there would have been as many supreme wills as there were States, and as many wars as there were wills. Happily, however, for *America*, this was not the case; there was but one war and one sovereign will to conduct it. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to direct, or break the violence of the storm; they accordingly *grew* into union, and formed one great political body of which Congress was the directing principle and soul. As to war and peace, and their necessary incidents, Congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove amidst the deities of old, paramount and supreme."

The right of capture of enemy property at sea had its counterpart in the right of confiscation of enemy property on land. It was a right which the Congress of the United States did not exercise. But that the right existed and was exclusively vested in Congress there cannot be a doubt. The first and last clauses of the Declaration of Independence affirmed the right of the United States to declare war and to conclude treaties of peace, and that Declaration, which has been happily called the "birth of a nation," was successfully main-

tained, and a treaty of peace concluded with England by the United States, acting all the time as a national unity. The war was virtually ended at Yorktown only a few months after the final adoption of the Articles of Confederation. Those Articles asserted indeed the separate sovereignty of the several States, and that each retained every power which was not thereby expressly delegated to the United States; but, by the 9th Article, "the sole and exclusive right and power of determining on war and peace" was expressly recognized to be vested in the United States, and the power was in its nature necessarily exclusive. It was a power which the United States had exercised from the first in conducting the war, with the acquiescence and approval of all the States, and it was a power which the United States would have had in concluding peace if the Articles of Confederation had never been adopted. Hence, in this connection, it was truly said by an eminent writer, in speaking of the foreign debts, that, "over the whole subject, the national sovereignty, of right, had exclusive control; for confiscation of the property of a national enemy belongs exclusively to the power exercising the right of war; and, therefore, whatever State laws might have been passed during the war, exercising rights which belonged to the national sovereign, they could have no validity when that sovereign came to resume its control over the subject, and to stipulate that the right of confiscation, if it ever existed, should not be exercised." History of the Constitution of the United States, by Curtis, Vol. I, p. 254.

It is true that the treaty of peace, while stipulating for the payment of British debts, did not engage for the restoration of property confiscated by some of the States, but only promised to recommend its restoration by the States. But that was a question of policy and not of constitutional or national power, since obviously the power to require the restoration of British property was one and the same with the power to require the payment of British debts, and each was equally an element and incident of national sovereignty.

Smith v. *Maryland*, 6 Cranch. 286, is no authority to the contrary. The question there discussed and decided referred

to the Maryland legislation as the excise of a municipal power of effecting forfeitures, and it was held that the statutory declaration of seizure and possession was equivalent to the common law procedure of inquisition and "office found." The legislation, in fact, was but a bungling attempt to exercise a power *de jure belli*, in the manner of the exercise of a municipal power, and it was void on that account alone, since confiscation being a right of war, according to the law of nations, must be exercised in accordance with the established requirements of that law, which include judicial proceedings, upon citation and monition, and opportunity for the owner to be heard before condemnation of his property.

This court, in *Smith* v. *Maryland*, only decided what it was asked to decide—namely, that the legislative declaration of seizure was equivalent to "office found" at common law, and it did nothing more. It is true that the question as to the constitutional validity of such legislation by Maryland as the exercise of a war power might have been raised and decided in the case, but the report of the case clearly shows that the question was not even suggested, either in the argument of counsel or in the opinion of the court; and that, on the contrary, it was passed over *sub silentio*. And it may be remarked that of the six judges of whom the court was then composed, two of them were absent—one of the absentees being Chief-Justice Marshall, probably on account of his personal interest in the litigation.

Surely, under the circumstances, this court is not concluded by anything that was said or done, or omitted to be done in that case, from considering and deciding a question of such gravity and importance now distinctly urged for adjudication. But if the legislative confiscation of Maryland was in the attempted exercise of a war power, which was not possessed by the State, but was exclusively vested in the Congress and Government of the United States, it was, of course, null and void *ab initio*, and no title which Henry Harford owned, passed by such legislation to the State of Maryland, and the deed from the successor in representation of Henry Harford passed the title to the Marshall heirs.

The Decision of the Supreme Court of the District of Columbia.

The Supreme Court of the District of Columbia rejected the claim of the Marshall heirs for reasons satisfactory to that court, and if those reasons should be considered sound by this court, the decree of the court below must of course be affirmed. It is therefore proper that those reasons should be respectfully considered. They will be noticed in their order:

1st. The court held that the grant to Lord Culpeper described the land as being in Virginia, and inasmuch as in the opinion of the court the province of Maryland had been already separated by the declaration in the Baltimore charter, that its territory should "not thenceforth be held or reputed a part of the land of Virginia," the Potomac river was not in Virginia.

It is respectfully submitted that the court has confounded *territory and jurisdiction with property rights.* If it be conceded that the Potomac river was not in Virginia, and was in Maryland, this concession would not affect this case. It would be only an example of inaccuracy of description, or of misdescription, and be covered by the concluding clause of the grant, expressly providing for such a contingency. Rec., Vol. III, 1132.

The Potomac river, its islands and soil, were granted, and if the property was inaccurately described as being in Virginia, this inaccuracy of description would neither annul or vitiate the grant, any more than would a mistaken description as to the location of a farm, when the identity of the farm could be made certain. "*Falsa demonstratio non nocet, cum de corpore constat.*" The Potomac river might well be within the jurisdictional and territorial limits of Lord Baltimore, and still be the property of Lord Culpeper.

2nd. The Potomac river and its soil had already been granted to Lord Baltimore, and therefore could not be granted to Lord Culpeper; and that the limits fixed by the charter could not be altered without the consent of his Lordship.

We have seen that in a similar grant this court has decided thas the *jus privatum* in navigable waters, and the soil under

them, did not pass to the grantee, the Duke of York. So far as the consent of Lord Baltimore is concerned, the record shows that he never claimed the *jus privatum* in the Potomac river and its soil, and that, *after the grant to Lord Culpeper*, he directed that the former grants of land, bordering on the Potomac river, should be resurveyed, and that if any of the grants should be found to embrace land under the tidal waters, that the mistake should be corrected. This is his language to the surveyors:

"In re-surveying old tracts, whereof parts may be found to be in the water, you are to be careful in certifying whether it was likely to have been washed away, or to have been an error in the original survey." And the same direction was made as to future grants. (Kilty's Land-Holders Assistant, page 289, and pp. 54, 55).

This amounts to a declaration on the part of Lord Baltimore, that if any of his grants had embraced land under tidal waters of the Potomac (see the map in Rec., Vol. VI, pp. 388, 389), the survey thereof was an error. What would constitute it an error? Certainly that he had not intended to grant such land, inferably, and that he had no right to grant it. The evidence that he made no claim is much stronger than evidence that he consented to waive it—the want of which seems to have constrained the judgment of the court below.

Lord Baltimore had been admonished that he should be careful not to displease the Crown—and he knew that James II was not to be trifled with. The doctrine of divine right and of passive obedience made his will the law for his subjects, and Lord Baltimore would not have dared to suggest to the King that he had conveyed his, Lord Baltimore's, property to Lord Culpeper.

Whatever else may be said of the weakness of the King, it required a revolution to wrest from him the sceptre of absolute authority. It was therefore the dictate of wisdom as well as of justice upon the part of Lord Baltimore to indicate in an unmistakable manner the denial of any claim adverse to His Majesty's grant to Lord Culpeper.

3d. The third ground on which rests the decision of the

court below, is that the deed from Philip Martin to Raleigh Colston, John Marshall, and James M. Marshall does not mention the Potomac river.

These appellants do not claim under that deed. They claim under a deed from Denny Martin Fairfax to James M. Marshall, conveying altogether different property, and using the broadest terms of assurance. Observe the language of the deed:—

"All and every those divers tracts, pieces and parcels of land (being part and parcel of the proprietary of the Northern Neck of Virginia) and all and every the now remaining real estate and beneficial interest of him, the said Denny Martin Fairfax, of whatsoever nature the same may be, if in and to arrive out of or from the same." Rec., Vol. III, p. 1312, and see p. 1313.

This deed was made by the said Denny Martin Fairfax, in the year 1797, and he, in express terms, excepted the land which Philip Martin, the devisee of Denny Martin Fairfax, in the year 1806, granted to Raleigh Colston and others. For this last deed, see Rec. Vol. III, p. 1321.

This was a grant of all lands in the Northern Neck, which Lord Fairfax devised to him, except certain manors and messuages, most of which were embraced in the subsequent deed from the devise of Denny Martin Fairfax to Colston and others. It is sweepingly comprehensive in its terms, and passed "all and every the now remaining real estate and beneficial interest of the said Denny M. Fairfax," included in the Northern Neck grant, which had not been conveyed to others, save the excepted parcels.

4th. That "there is unquestionable proof of the continued exercise of the authority to issue patents for islands in the river by Lord Baltimore, after the date of the Fairfax grant."

The court relies upon evidence laid before the joint commission for settling the boundary line between Virginia and Maryland, to show that Lord Baltimore, claiming to hold the Potomac river, its islands and soils, issued patents for islands in said river subsequent to the date of the Northern Neck grant.

It is respectfully submitted, that such evidence is not pertinent or admissible in these proceedings against these appellants. The object of that commission was political; to define the boundary line between two States, not to settle rights of property between rival claimants. This boundary commission had no jurisdiction of such matters. Neither State had legal authority to confer such power upon it, nor attempted to do so.

It would be much more reasonable, and in accordance with legal principles, for the appellants to rely upon the report made of January 15, 1874, by the Virginia commissioners to the following effect:

"VII.—Lord Baltimore was restored to his proprietary rights in Maryland by Charles II, subject to the grant made to Lord Hopten and Culpeper. The latter grant was never disturbed or questioned by Lord Baltimore by any proceedings before the courts of law or at the court of St. James. He yielded the whole Northern Neck to Lord Fairfax, and how and by what authority or act did he ever regain the Potomac river? Both alike, the land and the river, were alike granted, and the two were alike retained within the jurisdiction of Virginia." Rec. Vol. III, pp. 1160–1162.

But, let it be conceded that Lord Baltimore did grant islands in the Potomac river, under the claim that the crown grant to him was prior to that to Lord Hopten. What of that? It is not denied that the prior grant to Lord Baltimore was broad enough to embrace the islands in the Potomac river, then existing. But those islands of the Potomac river are not subject-matter of this controversy. The litigation concerns the the soil *under the river*, with the waters to the high-water mark. Is there any evidence that Lord Baltimore ever claimed that as his property? But suppose he did, this court has decided that property in the soils under navigable waters was not embraced in grants like that to Lord Baltimore. Islands above water are like all other lands above water, and are treated just as mountain and valley, forest and field are treated. If islands then existing in the Potomac river were embraced in the Maryland grant, they undoubtedly passed to Lord Balti-

more, and descended to his heirs, if not disposed of or forfeited in his lifetime, or afterwards legally confiscated by Maryland to its own use.

5th.—As against the claim as grantee of Lord Baltimore's heirs at law, the court below holds, that the State of Maryland had title independent of the confiscation proceedings, by virtue of succeeding, as sovereign, to all the rights of the British Crown.

But if the British Crown had, long before, conveyed its property in the Potomac river and its soil to Lord Culpeper, how could the State of Maryland succeed to a right which was not in the crown?

It is a well-settled principle that rights of property are not affected by change of sovereignty.

6th.—The last ground upon which the decision of the court below is founded is the act of the General Assembly of Virginia, called the "Compromise Act." And the court quotes from the opinion of the court of appeals of Virginia in the case of *Marshall* v. *Conrad*, 5 Call. 371, as follows:

"It is unnecessary to pursue the enquiry, because the compromise in 1796, made during the pendency of a suit in this court where all the points arose, has put an end to the controversy."

It was an agreed fact in that case that the said compromise had been carried out, and that deeds in confirmation thereof had been executed.

It had been supposed that the compromise would be carried out, and for that reason the fact was agreed, by the parties to that suit. The court did not adjudge that fact, but simply decided the law of that case, upon the agreed facts as stipulated by the parties. The main question in that case was whether the rent reserved on a grant made in 1753, by Lord Fairfax, was a quit-rent. It was contended that it was a quit-rent, and inasmuch as the deed from Denny Martin Fairfax to the Marshalls excepted quit-rents, the plaintiffs claiming under the deed could not recover.

But the *agreed fact* above-mentioned was not actual fact. The compromise was not carried out. The State of Virginia

repudiated it, and insisted upon her rights to the title of Lord Fairfax, which by the compromise act she was to surrender for a consideration—that consideration being the conveyance by Lord Fairfax to the State of all the waste and unoccupied lands in the Northern Neck grant—recognizing that all of them were represented by Chief Justice Marshall, with whom this compromise was made.

As has been said, the State of Virginia afterwards repudiated the compromise, refused to perform her part of it, and twenty years after the date of the act, this court reversed the judgment of the court of appeals of Virginia in favor of the title of Virginia to the very lands which the said compromise stipulated the State should abandon. *Fairfax* v. *Hunter*, 7 Cranch. The fact that the State Court refused to obey the mandate of this court, when sent down to it, shows how emphatic was the action of the State in the matter.

It can scarcely be maintained, in the light of the history of the compromise act, as it is written in the records of this court that the act was fully carried out, and therefore conclusive of the rights of the Marshall heirs.

That the compromise act was so repudiated and never carried out by the State of Virginia will further clearly appear from the fact that, although the act was passed in the year 1796, and the land which is the subject of this litigation was granted by Denny Martin Fairfax to James M. Marshall in in 1797, and that the State of Virginia, instead of abandoning the claim made in the case of "*Fairfax Devisees* v. *Hunter's Lessee*," continued to insist upon her title to the land in a most persistent litigation through the period of nearly twenty years. In other words, we find that, after the compromise act of 1796, both of the parties thereto acted in disregard of its terms—the State claiming what, under the compromise, it was bound to abandon, and the Marshalls taking a deed for the property, which Denny Martin Fairfax was to have granted to the State. There was really no consideration for the deed, which under the compromise, Denny Martin Fairfax was to make to the State—the State having no title, interest or estate in the property which it was to release.

Yet, notwithstanding the fact that neither the State of Virginia, nor any one claiming under Lord Fairfax, except the Marshall heirs (who have held constructive possession for more than a century) are claiming the property, the court below has ignored their claim.

We claim these points to have been settled:

1st. The soil of the Potomac river, with its waters, was embraced in the grant to Lord Culpeper.

2d. The grant was of a private nature and of private property, subject to the public rights of fishery and navigation and the commerce clause of the Constitution of the United States.

3d. That Lord Fairfax died seized and possessed of the property, and that his title is traced to the Marshall heirs.

4th. That by virtue of the treaty of 1794 between this country and Great Britain, this private property was, by the obligation of the government, protected from the claim of sovereignty, either State or Federal.

Conclusion.

We have not intended captiously or unkindly to criticise the action of the government in taking possession of this property, without the consent of the owners, or adopting the measures provided, where private property is acquired for public use (although we do think it would have been fairer and in every way better, had the government, either in its bill or in other pleading, disclosed its claims and tendered issues of law and fact thereto); such criticism would be gratuitous, in view of the fact that the government has opened the doors of its judicial tribunal for an inquiry as to the rights of the Marshall heirs, and, without doubt, a full recognition of them, and just compensation be made therefor when duly ascertained and determined.

Nor do we complain that valuable improvements have been placed upon the property; because whatever may be the legal consequences of such action, these appellants are entitled to all of the advantages which flow from them. It is no answer to their claim to say that they did not know their rights, or

that the property had never been of any value to them, or that they never intended to reclaim it, or that if the Government had not entered upon it and improved it, it would have been of no value to them.

The sole question before the court is this: *Does the bed of the Potomac river, with the waters of the river to the high-water mark, the subject matter of this litigation, belong to the appellants, the Marshall heirs?*

Assuming that their claim is held to be established, the result cannot be doubtful. The United States having voluntarily come into a court of equity, seeking equity, must do equity. A judicial tribunal, once adorned by the genius, learning and virtues of John Marshall, and whose subsequent history has proved it to be worthy of the high trusts confided to it by the constitution, will not ignore that provision of the sacred instrument, which declares that "*No person shall be deprived of his property, without due process of law; nor shall private property be taken for public use, without just compensation.*"

JAMES V. BROOKE,
JOHN HOWARD,
for the heirs of John Marshall.

October 6, 1898.